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IN THE

Supreme Court of the United States

NATIONAL RAILROAD PASSENGER CORPORATION,
Petitioner,

v.

ABNER MORGAN, JR.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF

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REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

National Railroad Passenger Corporation's petition for certiorari demonstrated that the decision of the United States Court of Appeals for the Ninth Circuit, permitting a plaintiff who knowingly allowed the statute of limitations to lapse to rely on the continuing violation doctrine to proceed with his claims, is inconsistent with both decisions of this Court and every other circuit court of appeals that has decided the issue. Respondent argues in opposition that: (1) the continuing violation doctrine was correctly applied in this case; (2) the Ninth Circuit's decision is not in direct conflict with Supreme Court precedent; (3) the split between the circuits is "illusory" because it involves a "minority" of circuits; and (4) the purpose of the "notice" limitation would not be served in this case. Respondent advocates an extremely expansive interpretation of the continuing violation doctrine, which has been rejected by this Court and all other circuits, that would permit reliance on the continuing violation doctrine whenever a plaintiff alleged *any* discriminatory conduct within the limitations period. Such an interpretation eviscerates Section 706(e)'s limitations period. There is a real conflict between the Ninth Circuit and the decisions of this Court and other federal courts of appeals. That conflict warrants this Court's review.

1. Respondent argues that the continuing violation doctrine was correctly applied in this case because *some* allegedly discriminatory conduct occurred within the statutory limitations period. Respondent contends that reliance on the continuing violation doctrine is warranted regardless of when plaintiff knew of the allegedly discriminatory conduct. (Br. in Opp. 4-7).[1] Significantly, Respondent does not dispute

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[1] In support of his argument, Respondent relies solely on other Ninth Circuit court of appeals' decisions. However, as Respondent acknowledges, these decisions are in direct conflict with decisions of other circuit courts of appeals which have held that the continuing

that he was aware of the allegedly discriminatory conduct nearly five years before he filed his EEO charge. (Br. in Opp. 14-15; Pet., App. 7a). Contrary to Respondent's assertion, the continuing violation doctrine was not designed to assist a plaintiff in preserving claims when he knew of the allegedly discriminatory nature of the conduct and failed to act. The continuing violation doctrine is premised on the equitable notion that the statute of limitations period should not begin to run until a reasonable person would be aware that his or her rights have been violated. *Alldread v. City of Grenada*, 988 F.2d 1425, 1432 (5th Cir. 1993). It is not designed to allow plaintiffs who know of allegedly discriminatory conduct to wait indefinitely to pursue their rights. *Hipp v. Liberty Nat'l. Life Ins. Co.*, (No. 99-10699), 2001 WL 575489, *8 (11th Cir. May 29, 2001)("This circuit and others have . . . [held] that 'a claim arising out of an injury which is 'continuing' only because a putative plaintiff knowingly fails to seek relief is exactly the sort of claim that Congress intended to bar by the 180-day limitation period.'"), *quoting Roberts Gadsden Mem. Hosp.*, 850 F2d 1549, 1550 (11th Cir. 1988). An interpretation of the continuing violation doctrine that allows a plaintiff to revive stale claims when the plaintiff knowingly fails to pursue them undermines the express purposes of the limitations period which is "to ensure expedition in the filing and handling of [discrimination claims]." *Love v. Pullman Co.*, 404 U.S. 522, 526 (1972).

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violation doctrine should not be applied in cases where the plaintiff was aware of the allegedly discriminatory nature of the acts at the time they were taking place. *See e.g., Garrison v. Burke*, 165 F.3d 565 (7th Cir. 1999); *Van Zant v. KLM Royal Dutch Airlines*, 80 F.3d 708 (2d Cir. 1996); *Webb v. Cardiothoracic Surgery Ass'n*, 139 F.3d 532, 538 (5th Cir. 1998); *Purrington v. Univ. of Utah*, 996 F.2d 1025 (10th Cir. 1993); *Sabree v. United Brotherhood of Carpenters & Joiners Local 33*, 921 F.2d 396 (1st Cir. 1990); *Berry v. Bd. Of Supervisors*, 715 F2d 971 (5th Cir. 1983).

Respondent also argues that reliance on the continuing violation doctrine was appropriate in this case because he alleged a hostile work environment claim. (Br. in Opp. at 5-6). However, as the First Circuit noted in *O'Rourke v. City of Providence*, the Ninth Circuit's absolute rejection of any notice limitation on the continuing violation doctrine "conflate[s] the question of whether there is an actionable hostile environment with the question of an exception to the 300 day filing requirement." *O'Rourke*, 235 F.3d at 731 n. 6. The First Circuit, among others, rejected "such a *per se* approach." *Id.; West v. Philadelphia Elec. Co.*, 45 F.3d 744, 755 (3d Cir. 1995); *Cf., Huckabay v. Moore*, 142 F.3d 233, 239 (5th Cir. 1998)(declining to decide whether every hostile environment claim necessarily constitutes a continuing violation).

2. Respondent then argues that Ninth Circuit jurisprudence is not in conflict with decisions of this Court. (Br. in Opp. 7-9). The crux of Respondent's argument is that in this Court's decisions in *United Airlines v. Evans*, 431 U.S. 553 (1977) and *Delaware State College v. Ricks*, 449 U.S. 250 (1980), there were no allegations of continuing violations or of illegal acts subsequent to the terminations—thus, there was no violation within the limitations period which could serve as an anchor for earlier untimely claims. (Br. in Opp. at 8-9). By contrast, Respondent argues, he did allege some discriminatory conduct that occurred within the limitations period. (Br. in Opp. at 9). Respondent's attempt to distinguish this Court's decisions fails because, at least in the case of *Ricks*, the plaintiff had alleged discriminatory conduct which occurred within the limitations period. In *Ricks*, the plaintiff argued that the continuing violation doctrine should apply to save his discriminatory denial of tenure claim in part because of a number of "unusual incidents"—including an alleged assault—that occurred within the limitations period. *Ricks*, 449 U.S. at 257, n. 8. Nevertheless, this Court rejected

plaintiff's reliance on the continuing violation doctrine and held that his claim was time-barred. *Id.*

Moreover, Respondent's attempt to distinguish this case factually from cases previously considered by this Court misses the point. This Court has adhered to the rule that a discrete event—such as a termination—triggers the running of the limitations period. *Ricks*, 449 U.S. at 257-58; *Int'l. Union of Elec. Radio & Machine Workers v. Robbins & Myers, Inc.*, 429 U.S. 229, 234-35 (1976). In this case, the first event that Respondent alleges was discriminatory—and that he acknowledges he believed was discriminatory at the time it happened—was his termination in 1991. (Pet., App. 7a). Respondent argues that because this termination was later reduced to a suspension, it lacks the requisite degree of "permanence" and thus, is not a discrete event. (Br. in Opp. 15). Respondent's argument directly conflicts with *Robbins & Myers*, where this Court held that the limitations period for filing a Title VII claim was not tolled during the pendency of grievance procedures under a collective bargaining agreement. *Robbins & Myers*, 429 U.S. at 236 ("the contractual rights under a collective-bargaining agreement and the statutory right provided by Congress under Title VII 'have legally independent origins and are equally available to the aggrieved employee.'") *citing Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974). Accordingly, an employee is entitled to pursue both remedies available under the collective bargaining agreement and those available under Title VII. The employee, however, must pursue both avenues simultaneously to preserve his claims. *See Johnson v. Railway Express Agency,* 421 U.S. 454 (1975)(holding that filing an EEO charge did not toll the running of the statute of limitations applicable to action under 42 U.S.C. § 1981); *Soignier v. Am. Bd. Of Plastic Surgery*, 92 F.3d 547, 553 (7th Cir. 1996)("An employee's pursuit of an internal grievance procedure does not affect the date on which his claim accrued.")

3. Respondent next argues that there is no meaningful circuit split because, by his count, only four other circuits are in direct conflict with the Ninth Circuit. (Br. in Opp. 9-13). Respondent does not count the Fifth Circuit as being in direct conflict with the Ninth Circuit, ignoring the fact that it expressly rejected the Fifth Circuit's analysis of the continuing violation doctrine. (App. 15a); *see also Fielder v. UAL*, 218 F.3d 973, 987 n. 10 (9th Cir. 2000). Continuing to rely on the incorrect premise that the Fifth Circuit's decision in *Berry v. Bd. Of Supervisors*, 715 F.2d 971 (5th Cir. 1983) is not at odds with the Ninth Circuit's decision in this case, Respondent parses the language of other circuit courts of appeals' cases which rely on *Berry* and concludes that the circuit split is "illusory" as only a "minority" of circuits are involved. (Br. in Opp. 13; 16). Respondent's quibble over the number of circuits that are in open and direct disagreement with the Ninth Circuit is disingenuous as the circuit split is real; the issue presented is important; and it impacts substantive rights of both plaintiffs and defendants.

4. Respondent further argues that the purpose of "notice" limitations is not served in this case because Petitioner was on notice of the allegedly discriminatory conduct. (Br. in Opp. 13-15). Again, Respondent misses the point, as the question of when a defendant knew that its conduct was perceived to be discriminatory is irrelevant to the application of the continuing violation doctrine. Moreover, whether or not the complained of conduct would "qualify for compensatory damages or warrant a federal lawsuit . . ." is also irrelevant. (Br. in Opp. 15). The only relevant inquiry is when the plaintiff knew that the conduct was discriminatory in nature. Indeed, the "permanence" factor in *Berry* is designed to ascertain whether the complained of conduct "should trigger an employee's awareness of and duty to assert his or her rights . . ." *Berry*, 715 F.2d at 981. Respondent admits that he believed the complained of conduct was discriminatory, (Pet., App. 7a), but he failed to file a timely EEO charge.

Respondent finally argues that when a plaintiff makes an effort to assert his rights short of litigation, he should not be penalized for the employer's failure to respond to such efforts and should be permitted to rely on the continuing violation doctrine to revive time-barred claims. (Br. in Opp. 14). Once again, Respondent's argument is misplaced and without foundation. The "notice" limitation not only ensures that employers have notice of adverse claims, but it also ensures that employees do not sit on their rights and then attempt to pursue stale claims. *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 352 (1983)(noting that limitations periods are intended to put defendants on notice of adverse claims "*and to prevent plaintiffs from sleeping on their rights.*")(emphasis added). As discussed more fully in the Petition, this Court has expressly rejected equitable tolling rules that would extend the limitations period for plaintiffs who knowingly fail to assert their rights pursuant to Section 706(e). (Pet. 22-26). In this case, Respondent chose not to file a timely EEO charge and elected to seek resolution of his dispute through other means. Respondent was not prevented from filing a timely charge and Petitioner should not be penalized for Respondent's choice.

CONCLUSION

For the foregoing reasons, and those set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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